the business of the payee was dishonorable and of such a nature as to put a prudent man on inquiry,[39] was held insufficient to defeat the rights of a purchaser for value. And, of course, where any investigation on the part of the taker would prove futile, he is protected.[40]

However, this suspicion may become of such a nature as to charge the taker with bad faith, and thus render him liable to the equities between the original parties. Where an indorsee knew that the title to land given for a note was questionable and that the grantee intended to resist the collection of the note if evicted,[41] or where the taker's suspicion was so keen as to require a new note to be made before taking,[42] the circumstances are clearly such as to put him on inquiry. From this it might well be left to the jury to decide whether any bad faith existed in the principal case.

SHOULD A STRIKE EXCUSE DELAY IN PERFORMANCE OF A CONTRACT?—The courts have long recognized that under certain circumstances subsequently arising contingencies, unforseen at the time of the inception of a contract, will excuse impossibility of performance.[1] Should a supervening strike be regarded as such a contingency? The courts have generally held that where a contract specifies a fixed time for performance and there is no stipulation as to the effect of a subsequent strike, the party unable to perform in due time because of the strike is not excused from his obligation and is bound to pay damages for non-performance.[2] The other party is not obliged to accept performance after the date fixed.[3] If he does so he is entitled to damages for the delay.[4] This result apparently follows from the recognition by the courts that a strike, just as numerous other contingencies, is one of the risks that is incident to the obligation and that the party assum-

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[39] Shreeves *v.* Allen (1875) 79 Ill. 553.

[40] Morehead *et al. v.* Harris (1916) 121 Ark. 634, 182 S. W. 521.

[41] Knapp *v.* Lee (1826) 20 Mass. 452.

[42] Pierce *et al. v.* Kibbee (1879) 51 Vt. 559.

[1] Pollock, Contracts (Wald, 3rd ed.) *398 *et seq.;* 2 Parsons, Contracts (9th ed.) *673; Woodward, "Impossibility of Performance, as an Excuse for Breach of Contract." 1 Columbia Law Rev. 529; McNair, "War-Time Impossibility of Performance of Contract." 35 Law Quart. Rev. 84; 16 Columbia Law Rev. 668.

[2] Morse Dry Dock & Repair Co. *v* .Seaboard Transportation Co. (D. C. 1907) 154 Fed. 90; Koski *v.* Finder (1913) 176 Ill. App. 284; Budgett & Co. *v.* Binnington & Co. [1891] 1 Q. B. 35; see Barry *v.* United States (1912) 229 U. S. 47, 33 Sup. Ct. 681.

[3] See Grannis & Hurd Lumber Co. *v.* Deeves (N. Y. 1893) 72 Hun 171, 25 N. Y. Supp. 375; Anson, Contracts (12th Eng. ed.) 298. For a discussion of the effect of stipulations as to time in courts of equity see Anson, *ibid.;* Pollock, *op. cit.* *504.

[4] In Koski *v.* Finder, *supra,* footnote 2, a building contractor who because of a two months' strike had not completed his contract at the date of performance was not allowed to sue on his contract for the work he had done. Although he was permitted to proceed on a *quantum meruit,* the defendant was allowed to counterclaim for the damage he had sustained as the result of the delay.

ing the obligation assumes that risk in the absence of an expressed stipulation to the contrary.[5]

Where, however, there is no time stipulation in the contract a different result has been reached. This is apparently due to the effect that the courts have given to the absence of the time provision, and not to any different conception of the effect of a strike as a supervening contingency. All the courts lay down the rule that in a case where no time is fixed a reasonable time for performance is to be inferred.[6] But while such language is universally used it is perfectly clear that behind the words thus employed there are hidden two distinct conceptions of what a reasonable time is: (1) what appears to have been the expectation of the parties as reasonable men when they entered into the contract; (2) what turns out to be reasonable for the promisor in the exercise of due diligence, without any reference to the contract and only with reference to actual conditions as they arise in the course of performance. The latter construction was adhered to in the recent federal case of *Richland Queen S. S. Co.* v. *Buffalo Dry Dock Co.* (2 C. C. A. 1918) 254 Fed. 668. A shipowner left his ship for repair in the defendant's dockyard. No time was fixed for the work. The vessel was returned with repairs in 69 days, a strike of 80% of the workmen having caused a delay of 30 days. The court, one justice dissenting, adopted the usual language to the effect that the defendant was entitled to a reasonable time in which to perform his contract, but declared that in view of the strike the work was completed without unreasonable delay. The majority opinion laid down the test in the following language, "The question is whether the delay complained of was reasonable or unreasonable, not in view of the circumstances existing at the time the contract was made, but in view of the circumstances existing when the contract was being performed."[7]

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[5] In Thiis *v.* Byers (1876) L. R. 1 Q. B. 244, sixteen days were given a charterer to load a ship. Bad weather causing a delay of four days was held to be no excuse and the charterer was held liable for the four days' demurrage. In Porteus *v.* Watney (1878) L. R. 3 Q. B. 534, a delay caused by the neglect of a third party was no excuse when fourteen days only were given for unloading. In Randall *v.* Lynch (1809) 2 Camp. 352, the charterer was held to bear the risk of delay arising from the crowded state of the place at which the ship was to load. And so in Barret *v.* Dutton (1815) 4 Camp. 333, as to the risk of frost preventing access to the vessel. In all these cases there was a definite time stipulation. See Empire Transportation Co. *v.* Philadelphia & R. Coal & Iron Co. (C. C. A. 1896) 77 Fed. 919.

[6] See Hick *v.* Raymond (1892) 1 Reports 125; Empire Transportation Co. *v.* Philadelphia & R. Coal & Iron Co., *supra,* footnote 5; Eppens, Smith, & Wiemann Co. *v.* Littlejohn (1900) 164 N. Y. 187, 58 N. E. 19; Frankfort-Barnett Co. *v.* William Prym Co. (C. C. A. 1916) 237 Fed. 21, 25; Ollinger & Bruce Dry Dock Co. *v.* James Gibbony & Co. (Ala. 1919) 81 So. 18.

[7] The decision follows a line of English cases where the question has arisen in relation to the time for unloading vessels under charter parties where there was no time stipulation. The charterer in such cases is held to be bound only to reasonable dispatch, which has been interpreted by the Court of Appeals in Hick *v.* Rodocanachi [1891] 2 Q. B. 626, and approved by the House of Lords in Hick *v.* Raymond, *supra,* footnote 6,

It is submitted that this method of judging what is a reasonable time does violence to contract principle. The courts in imposing a liability on the parties must find some basis for doing so. This they must find in the contract entered into between the parties for the very reason that the parties themselves look to their contract for their obligations and liabilities. When a contract obligation is not set forth in sufficient detail, then there is either no contract at all because of a lack of certainty;[8] or, if there is a contract, then what that insufficiently defined obligation is must be determined in the light of the surrounding circumstances existing at the time of the contract.[9] Where no time is specified for performance no court will declare the contract void for uncertainty. In their attempt to give effect to the intention of the parties, all courts infer by adopting a standardized inference of intention that a reasonable time is meant, with the diverse connotations referred to above.[10] And it is justifiable that the

to mean, not that the charterer must unload within a time which would be reasonable under ordinary circumstances, but that he must use proper diligence under the actual circumstances and he is not liable, therefore, for delay caused by a strike unless the strike is attributable to his own fault.

It is to be noted that in Hick v. Rodocanachi which follows Ford *v.* Cotesworth (1870) L. R. 5 Q. B. 544, the court goes upon the theory that there is a contract implied in law when there is no time stipulation and that the obligation created by the so-called contract is to perform with due diligence under circumstances arising in the course of performance,—the province of the jury being merely to determine whether such due diligence was exercised in the light of supervening events. The same is true of Hick *v.* Raymond, *supra.* It is submitted, however, that this is inconsistent with the idea that the court is travelling on any contract theory under which the same result would be reached. For, if it were so doing, it would have to instruct the jury to find what the promise was, and only in the absence of evidence to the contrary to find that there was a promise to use due diligence,—and then, whether in view of all the subsequent circumstances such diligence was duly exercised.

In Ford *v.* Cotesworth, *supra,* performance was delayed for seven days because of a threatened bombardment of the port of discharge. But in that case the court went on the theory that this threatened bombardment was a *vis maior,* thereby excusing the delay. Consequently, it was unnecessary in the decision to determine what constituted a reasonable time. But whether this contingency should have been regarded as a *vis maior* is open to question. *Cf.* Pollock, *op. cit.* *535; 1 Columbia Law Rev. 533; 35 Law Quart. Rev. 99. *Cf.* Postlethwaite *v.* Freeland (1880) L. R. 5 A. C. 599, where unloading was to be done "according to the custom of the port." In this case a delay of thirty-one days was held not to be unreasonable because the inability to unload was due to the necessity of abiding by the custom of the port, which was to unload according to priority of arrival. This case appears to be soundly decided under any theory because by the contract the parties provided for such contingencies as actually arose by virtue of the "custom of the port" clause.

The result reached in Hick *v.* Raymond, *supra,* is the same as that reached in a similar class of cases in the United States. Empire Transportation Co. *v.* Philadelphia & R. Coal & Iron Co., *supra,* footnote 5, followed with approval in Acme Transit Co. *v.* 133,000 Bushels of Wheat (D. C. 1917) 243 Fed. 970.

[8] Pollock, *op. cit.* *45 *et seq.*

[9] Anson, *op. cit.* 7.

[10] *Supra,* footnote 6.

courts should declare that a contract does exist. But it must be realized that once they arrive at this result they are logically bound to assert that that obligation, insufficiently defined because of the unexpressed time element, must be determined by the contract at the point of its inception just as well as the obligations that are definitely expressed in it. A reference to subsequent events and intervening contingencies is no more permissible in this case to determine what was in the contract than in the case of a contract in which everything is fully specified. Subsequent circumstances can only alter the contract on the theory of novation,—that the parties have intended a new contract to arise and to stand in lieu of the former. The only possible justification for the courts in disregarding the contract would be that a broad business policy so dictates. But there seems to be no such ground of policy on which the courts travel in view of the fact that in cases where there is a definite time stipulation they refuse to disregard the contract and they do not allow contingencies such as strikes to excuse non-performance.[11]

If what is a reasonable time, therefore, is to be determined by the contract entered into between the parties the first conception noted above is sound. The question then remains: What should the courts infer the expectation of the parties as reasonable men to have been when they entered into the contract? In answer to this there are two opposing views. One view is that the party to perform promises merely to use diligence.[12] On the other hand, it has been presumed that the party promises to perform within a time that would be reasonable under conditions existing at the time of the inception of the contract.[13] The principal case can be supported on the former of

[11] *Supra,* footnotes 2 and 5.

[12] Empire Transportation Co. *v.* Philadelphia & R. Coal & Iron Co., *supra,* footnote 5, although fully adopting the law as laid down by the English court in Hick *v.* Raymond, *supra,* footnote 6, does refer to the contract of the parties and asserts that the promise in such cases is to perform "with reasonable diligence."

[13] In Eppens, Smith & Wiemann *v.* Littlejohn, *supra,* footnote 6, plaintiff vendor was prevented from shipping coffee from a foreign port because of a lack of transportation facilities. Although he made every reasonable effort and did ship at the first opportunity he was not allowed to recover damages against the defendant for refusal to accept. On p. 191, the court said, "What constitutes a reasonable time usually depends upon the circumstances of the particular case, such, at least, as the parties may be supposed to have contemplated in a general way in making the contract." This is approved and followed in Sturges & Burn Mfg. Co. *v.* American Separator Co. (1916) 171 App. Div. 429, 156 N. Y. Supp. 872.

"It seems to me the correct mode of ascertaining what reasonable time is in such a case as this, is by placing the Court and jury in the same situation as the contracting parties themselves were in at the time they made the contract: that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made, and under which the contract itself took place. By so doing, you enable the Court and jury to form a safer conclusion as to what is the reasonable time which the law implies, and within which the contract is to be performed." Alderson B., Ellis *v.* Thompson (1838) 3 M. & W. *445, *457. In this case lowness of water delayed a shipment of goods beyond the time that would ordinarily have sufficed. This delay was held

The final issue comes down to this: which is the fairer of these two presumptions? Most of the English and American decisions in their conclusions could be reconciled on the theory that the party to perform promises merely to use due diligence.[14] It is believed, however, that this is not the fairer presumption for the courts to make, for in essence it benefits one party at the expense of the other. Carried to its logical conclusion the result would be that the one party would have as time for performance a period extending indefinitely depending upon the number and duration of subsequently arising contingencies of whatever nature not within his control. Suppose A agreed with B to pay B $500 for a horse already delivered. There is no time stipulation for payment in the contract. At the inception of the contract A is prosperous. A few days thereafter his worldly possessions are destroyed by fire. Financial reverses follow from which with the greatest diligence he is unable to recover. No court would allow A to set up due diligence as a defense in a suit against him two years later for the $500. Yet, it is submitted, that this should logically follow if it is to be inferred that the promise is solely to use due diligence. Furthermore, in the ordinary case it would seem that

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to be unreasonable and the defendant was discharged from his contract liability.

In Adams *v.* Royal Mail Steam Packet Co. (1859) 5 C. B. (N. S.) 491, the defendant freighters claimed as an excuse for delay in loading a vessel a difficult railway and colliery situation that was beyond their control. The court did not allow the defense saying, at p. *497, "They should have taken care to protect themselves by some stipulation, if they contemplated relieving themselves from the consequences of fortuitous or unforeseen impediments to the due performance of their contract." *Cf.* Harris & Taylor v. Dreesman (1854) 23 L. J. 210 Ex., which is distinguished in this case.

The New York courts have reached a curious result by virtue of decisions rendered in the two cases of Blackstock *v.* New York & Erie R. R. (1859) 20 N. Y. 48, and Geismer *v.* Lake Shore & M. S. Ry. (1886) 102 N. Y. 563, 7 N. E. 828. In both of these cases a common carrier was delayed in its transportation of goods for plaintiff because of a strike of its workmen. No time was specified and performance was recognized by the courts to be due in "a reasonable time." In the former case relief was given to the plaintiff, and in the latter relief was denied. The court in the latter decision distinguished the cases on the ground that in the first case the strike was a peaceful one and hence did not excuse delay, while in the latter there was a violent strike which was an excuse.

The recent case of Burns Grain Co. v. Erie R. R. (1918) 102 Misc. 28, 168 N. Y. Supp. 154, adds to the confusion in New York law, at least as applied to carriers. In this case a carrier claimed as excuse for delay in delivery the extraordinary congestion of freight on its own and other railway lines. The court did not allow this defense because the consignor was uninformed of the congestion when he offered the goods to be transported and the railroad company did not undertake to apprise him of the freight conditions. There is a *dictum,* however, in this case to the effect that if there were no congestion on the lines when the contract was made subsequent congestion might excuse delay.

these two standardized inferences.

[14] In addition to the cases cited, *supra,* footnote 7, see the following cases. Cross *v.* Beard (1862) 26 N. Y. 85; Whitehouse *v.* Halstead (1878) 90 Ill. 95; The J. E. Owen (D. C. 1893) 54 Fed. 185; Taylor *v.* Great Northern Ry. (1867) L. R. 1 C. P. 385.

contracting parties, fixing no time for performance contemplate a continuation of normal conditions of labor and a normal supply of material. They contemplate no change in the then existing circumstances that are to come into play in the carrying out of the contract; and according to their expectations due performance will be on this basis.[15] If that is so, each party should assume the risks attendant on his obligations just as in contracts with a definite time stipulation, and in the absence of express provision to the contrary[16] the practice of normal industrial activity should determine by whom these risks are to be borne.

RECEIVING THE PROCEEDS OF STOLEN GOODS AS A CRIMINAL OFFENSE.—"The crime of receiving stolen goods includes generally the receiving, buying, concealing, or aiding in concealing goods stolen or embezzled with knowledge that they were so stolen or embezzled, and with fraudulent intent to deprive the true owner thereof."[1] In early common law this offense was but a mere misdemeanor,[2] and only included the receipt of goods which had been secured by common law larceny. Later the crime was elevated to a felony by the Statute of 3 William and Mary, c. 9, § 4, which made the receiver an accessory after the fact.[3] But since an accessory could not be convicted before the conviction of the principal felon[4] it was impossible to prosecute the receiver whenever the principal could not be found, or was not amenable to justice. To overcome this difficulty the supplementary statutes of 1 Anne, c. 9, § 2, and 5 Anne, c. 31, §§ 5, 6, were passed providing "that where the principal felon could not be taken, the receiver might be separately prosecuted as for a misdemeanor."[5] Later the Statute of 7 and 8 George IV, c. 29, § 54, made the offense of

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[15] *Supra,* footnote 13.

[16] In the following cases there was such an expressed stipulation: Matsoukis *v.* Priestman & Co. [1915] 1 K. B. 681; Delaware L. & W. Ry. *v.* Bowns (1874) 58 N. Y. 573; Weber *v.* Collins (1897) 139 Mo. 501, 41 S. W. 249; Wood *v.* Keyser (D. C. 1897) 84 Fed. 688. In Koski *v.* Finder, *supra,* footnote 2, the court at p. 291 dismisses the excuse for delay in performance because of the strike on the ground that "the contract does not make a strike an excuse for delay."

[1] 34 Cyc. 514.

[2] 2 Bishop, New Criminal Law (8th ed.) § 1137; 2 Russell, Law of Crimes (7th Eng. ed.) 1465; Kenny, Outline of Criminal Law 252. "To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere *misdemeanor,* and made not the receiver accessory to the theft; because he received the *goods* only and not the felon." 4 Blackstone, Comm. (Lewis ed.) *38.

[3] Thomas Butler & Thomas Quin *v.* The State (S. C. 1825) 3 McCord *383; see State *v.* Hodges (1880) 55 Md. 127.

[4] 18 Columbia Law Rev. 471; see The State of Connecticut *v.* Weston (1833) 9 Conn. 527; "And unless the principal felon was convicted, the receiver as an accessory after the fact could not be convicted. If then the principal felon escaped or was kept out of the way, the receiver went unpunished." State *v.* Hodges, *supra,* footnote 3, at p. 135.

[5] See State *v.* Hodges, *supra,* footnote 3; 1 Bishop, *op. cit.* 699.